IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL NO. 85 OF 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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PARVATIBEN WD/O HARIRAM P. DAVE & ORS. - Appellant(s)
Versus
BHAMARIBEN WD/O MOHANLAL HEMRAJ - Respondent(s)

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Appearance :

SHRI JAYRAJ CHAUHAN for SHRI MUKUND M. DESAI for Appellant(s).
SHRI VIPUL S. MODI for Respondent(s).

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 28/12/2006

ORAL JUDGMENT

1. The appeal has been admitted for hearing the parties on the following substantial questions of law:

“(i) Whether on the facts and in the circumstances

of the case, the learned first appellate court was justified in not considering Exh.113/1 which was produced by the plaintiffs, even when both the parties have submitted their arguments on the said documents?

(ii) Whether the learned first appellate court was justified in observing that the plaintiffs had come to the court with the plea that they were exclusive owner of the property in dispute, but as they later on asserted in the evidence that they were joint owners, there are variances between the pleadings and proof and the plaintiffs would not be entitled to any relief?

(iii) Whether the learned trial court on the facts and in the circumstances of the case should have allowed the parties to lead evidence to prove the document which they could not prove under the misconception of law that production of the document would be proof of the document?

2. The plaintiff (since deceased) had filed a suit submitting, *inter alia*, that he is the owner of the property; the respondent (since deceased) had no right, title or interest in the property; despite no authority under law, he is trying to raise certain constructions on the land belonging to the plaintiff, therefore, he is required to be restrained. The defendant appeared in the

Court and submitted that the property did not belong to the plaintiff, he was the exclusive owner of the property and in any case, he has perfected his title by adverse possession.

2.1 After recording the evidence of the parties, the learned trial Court, placing reliance upon the version of the defendant and ordinary copy of the document which was filed in some other proceedings, held that the plaintiff is not the owner of the property, the defendant is the owner of the property and the defendant has perfected the title by adverse possession. Being aggrieved by the said judgement and decree, the appellants filed an appeal. As the appeal proved futile, the plaintiffs are before this Court.

3. It is to be seen from paragraphs 23, 25, and 26 that the learned Court below held that ordinary copy produced by the defendant could not be looked into nor the same could be considered in evidence. It also held that the defendant failed in proving that he acquired title by adverse possession, it observed that the trial Court wrongly held that the defendant is the owner of the suit plot and the trial Court rightly held that the defendant was in possession of the suit plot. Being

aggrieved by the said judgement, the appellant is before this Court. It is to be noted from the judgement of the lower Appellate Court, as contained in paragraphs 25 and 26, that the defendant is not the owner of the property/suit plot, nor has perfected the title by adverse possession, the defendants have not filed any cross objections. The findings recorded by the Court below are to be taken as those are.

4. Shri Chauhan, learned Counsel for the appellants, submits that if the defendant is not the owner of the property and has not perfected his title by adverse possession and the Appellate Court has not recorded any findings that whether the plaintiff is the exclusive owner or joint owner, then, the Court should hold that the plaintiff being the exclusive owner and the defendant having failed in proving his title, the plaintiff would be entitled to a decree.

5. Shri Modi, learned Counsel for the respondents, submits that in paragraph 17 of the judgement, the learned Appellate Court has observed that the plaintiff has failed in proving his ownership. He submits that present is a case where the lower Appellate Court has recorded contradictory findings and the findings cannot

be relied upon.

6. I have gone through paragraph 17 of the judgement. Though the language adopted by the learned Appellate Court is little cryptic and confusing, but, it appears that the learned Judge wanted to say that the learned trial Court had rightly held that the proceeding before the City Survey Officer in respect of the suit plots were valid. Nowhere in the judgement, the Appellate Court has held that the plaintiff is the exclusive owner of the property or joint owner of the property. It appears that while holding that the proceedings of the City Survey Officer were justified and valid, the Court forgot to record that whether the plaintiff is the owner of the property or not.

7. It is trite to hold that any survey made by the City Survey Office/Officer is for the fiscal purposes only. The City Survey Officer has no authority under the law to declare a particular person as owner of the property. The dispute relating to the ownership can be decided only by a Civil Court of competent jurisdiction. In the present matter, the learned Appellate Court did hold that the defendant has not perfected the title by adverse possession and that the defendant has no

ownership in the property, but, it did not hold that the plaintiff has proved or not proved or failed in proving that he is the owner of the property. As a sequel of the findings that the defendant is not the owner of the property or has not perfected his title by adverse possession, I could record a finding that the plaintiff is the owner of the property, but, at the request of Shri Modi, I do not enter into such dispute. Shri Modi, at this stage, submits that the matter be remanded to the learned first Appellate Court for recording findings in accordance with law. Shri Desai has no objection to it. He, however, submits that the findings recorded by the learned first Appellate Court that the defendant has failed in proving his title by adverse possession and exclusive ownership should be confirmed by this Court.

8. After hearing the parties and taking into consideration that the above referred findings have not been challenged by the defendants either in separate appeal or by filing cross objections, I must hold that the learned Appellate Court was justified in holding that the defendants have failed in proving acquisition of title by adverse possession/prescription. I must also hold that the defendants have failed in proving that they are exclusive owners of the property.

9. It is also to be noted that complaint of each of the party is that the trial Court did not give them proper opportunity to prove the documents on which they were placing reliance. As I propose to remand the matter, I do not think that I must decide this question. This question shall be decided by the learned first Appellate Court that whether proper opportunity was given or not.

10. The matter is remanded back to the learned first Appellate Court for decision afresh. The parties present in the Court shall appear before the learned first Appellate Court on 22nd January, 2007. The Court shall give the parties proper opportunity to submit their case and it shall record its findings that whether the plaintiffs are the absolute owner of the property or the plaintiffs and the defendants are the joint owners of the property. It shall not enter into the question that the defendants are the absolute owner of the property or have perfected their title by adverse possession because the said findings have been confirmed by this Court.

11. Even while making the remand, I must make it clear that till final disposal of the matter by the learned first Appellate Court, the defendants-

respondents would not be entitled to make any construction upon the property because if the plaintiffs are the absolute owners, then, they can restrain the defendants from raising any construction and if the plaintiffs are the joint owners of the property with the defendants, then, one of the co-owners cannot raise any construction detrimental to the interest of other co-owners without permission of such co-owner.

12. The appeal is, accordingly, disposed of. Let a decree be framed accordingly. No costs.

[R.S.Garg, J.]

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